SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1276

RICHARD B. COTTEN,

Petitioner,

v.

THE HONORABLE, JAMES R. SCHLESINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF LIBERTY LOBBY, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION OF RICHARD B. COTTEN, FOR WRIT OF CERTIORARI.

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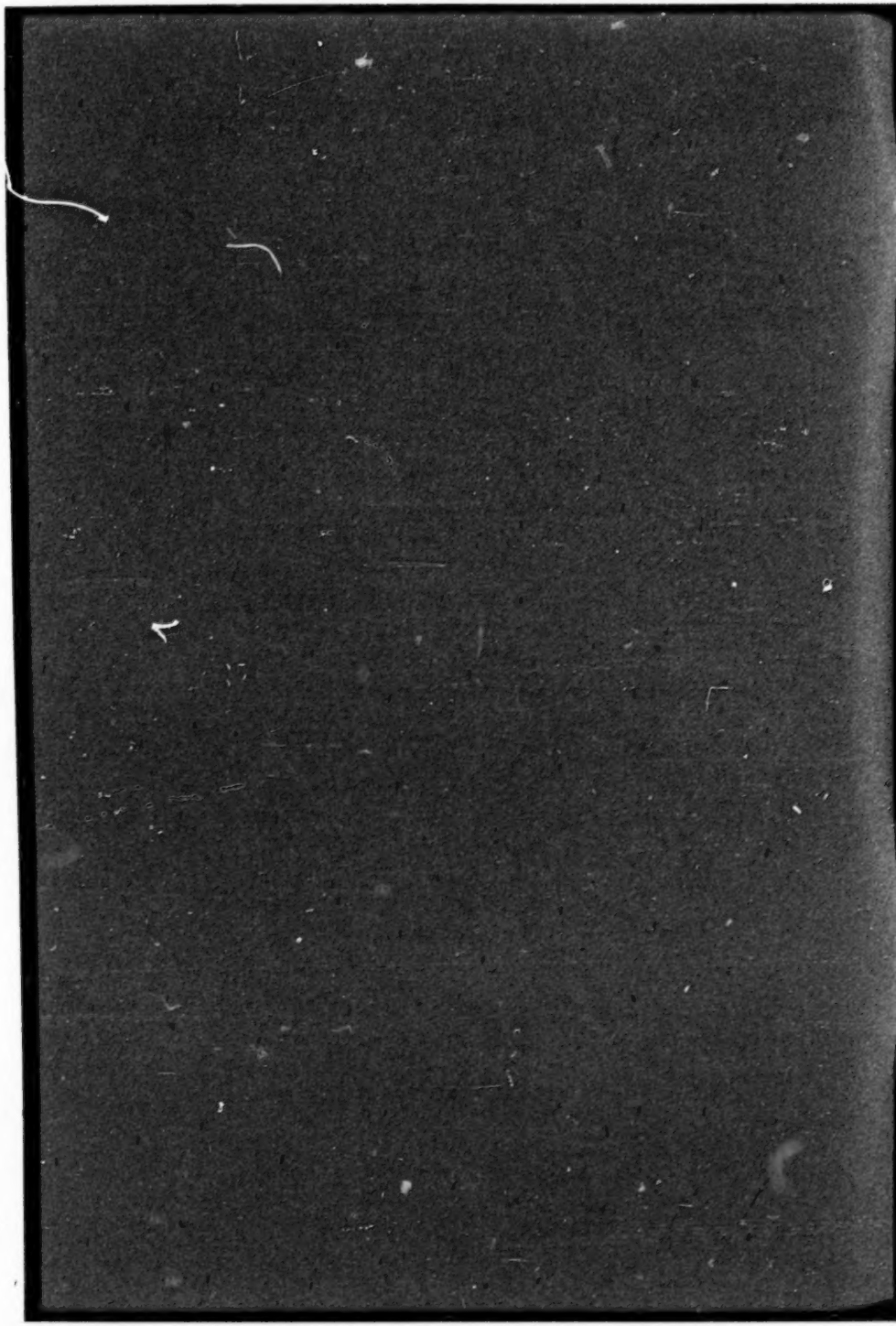

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BRIEF OF LIBERTY LOBBY, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION OF RICHARD B. COTTON, FOR WRIT OF CERTIORARI.

With consent of the parties, Liberty Lobby respectfully submits this brief as *amicus curiae* in support of the petitioner.

INTEREST OF THE AMICUS CURIAE

Liberty Lobby is a non-profit citizens' association organized under the laws of the District of Columbia. It was established in 1960 to speak for and to protect the interests and liberties of patriotic citizens of the United States from pressure groups working in opposition to the public interest. It is composed of approximately 23,000 Board of Policy members, (substantial financial supporters, who participate in policy,) plus many tens of thousands of subscribers to its monthly legislative report. Approximately a quarter million Americans are estimated to read the monthly publication "Liberty Letter." Members and subscribers are located throughout the United States. They thereby represent a significant strata of the nation's citizenry and electorate.

This case involves the issue of whether or not, under the constitution and laws of the United States, citizens and taxpayers have the right to challenge in the courts, alleged unlawful actions by administrative officials and functionaries that result in significant harm to, and sorely aggrieve, said citizens and taxpayers. The decision of the United States Fourth Circuit Court of Appeals, if left standing, will in the view of Liberty Lobby, fundamentally alter and denigrate the historic right of citizens, granted to them in the Bill of Rights, to challenge unlawful actions by public officials. Such a result would constitute a drastic loss of liberty, and would be wholly repugnant to all men who cherish freedom.

Accordingly, Liberty Lobby has a proper interest in the resolution of the issues before the Court in this case.

ARGUMENT

I.

THE PRESENT CASE INVOLVES A SIGNIFICANT INTERPRETATION OF THE LAW OF STANDING AS IT AFFECTS THE RIGHT OF CITIZENS AND TAXPAYERS TO CHALLENGE UNLAWFUL ACTIONS BY PUBLIC OFFICIALS.

The standing issue presented by this case may not be mooted by the passage of any statute. The right of a citizen to challenge in the courts an unlawful misuse of government property is inherent under the property clause of the Fifth Amendment to the United States constitution. It is abundantly clear that, if citizens are barred by the doctrine of standing from proceeding with this action, no authoritative and binding determination will ever be made of whether or not the provisions of the Foreign Military Sales Act of 1968,[1] relied upon by respondent, do in fact empower him to transfer to Israel, by sale or otherwise, defense articles procured with monies appropriated solely "for the use of the Armed Forces of the United States."[2] If U.S.

[1] Title 22 U.S.C. 2761.

[2] Many of the items transferred to Israel by the Secretary were items procured with monies provided under the then current U.S. Armed Forces Military Appropriations Act, P.L. 93-155 which reads:

> TITLE I – Procurement
>
> Sec. 101. Funds are hereby authorized to be appropriated during the Fiscal Year 1974 *for the use of the Armed Forces of the United States* . . . (Emphasis added.)

citizens, many of whom are active, reserve and retired members of the Armed Forces and of the Militia, cannot obtain judicial review of an official's unlawful disposition of essential defense articles, then as a practical matter no one can. An esteemed and cherished member of this honorable Court has held:

> . . . the role of the federal courts is . . . to protect the individual against prohibited conduct by the other two branches of the Federal Government . . .
>
> With the growing complexities of government (the judiciary) is often the one and only place where effective relief can be obtained . . . where wrongs to individuals are done by violations of specific guarantees, it is abdication for courts to close their doors.
>
> . . . (the individual) faces a formidable opponent in government, even when he is endowed with funds and with courage.
>
> I would not be niggardly therefore in giving private attorneys general standing to sue.[3]

We submit, any taxpayer who asserts that he is adversely affected and aggrieved by an illegal public act has standing to sue, not only in his own behalf, but on behalf of the public as well.[4] No confrontation between different branches of the Government is involved when a court interprets a statute. It is the constitutional duty

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[3] Justice Douglas, *Flast v. Cohen*, 392 U.S. 83 (1968).

[4] K.C. Davis, "Standing-taxpayers and others," *University of Chicago Law Review*, Vol. 35:601ff. (1968) esp, at p.-632-633. See cases cited therein. Professor Davis, the foremost legal scholar on the law of standing, criticizes current ambiguities and illogicalities in the law in need of clarification. This case hopefully offers an opportunity to resolve the ambiguities.

of the judiciary, when asked by a proper party, to examine, to review, to clarify, and to uphold the law. This honorable court should forestall attempts to extend the doctrine of standing beyond the bounds of reason through resourceful, yet shallow, rationalization. This Court should be on guard that the doctrine of standing not be used as a cloak behind which to hide judicial bias and lack of objectivity. No instrument, we submit, more readily lends itself to judicial manipulation, than an ambiguous standing doctrine. With it courts are enabled to select and choose from among citizens challenging the execution of the laws, those favoring their own bent or conforming to a court's own standard of ideological comportment. It is not the granting, but the denial, of standing which should be feared as a judicial excess. It is the fear of an alert citizenry, not the fear of intrusion on legislative and executive prerogatives, that has in the past led to the outrageous ambiguities, vain illogic, and the insufferable indignities of an uncertain standing doctrine. The doctrine of standing, when used, as it has been in this case, to bar citizen access to the courts to contest illegal state action, becomes an instrument of tyranny, not of law. It offers a feeble excuse to support a court's failure to judge an issue of law on its merits. The standing doctrine should provide no court with an excuse to ignore clear violation of statute.

II.

THE LOWER COURT ERRED IN FAILING TO REVIEW THE FOREIGN MILITARY SALES ACT OF 1968.

This Honorable Court may choose to limit its review to the standing question, but we submit that the issue of statutory interpretation is inextricably interwoven with the standing question.

When a citizen asserts that his rights have been violated by a public official's illegal act, the court is under a duty to review the statute to determine if, in fact, the citizen has been adversely affected or aggrieved within the meaning of any statute.[5] If so, then the citizen has standing. A citizen is drawn before the court in a cart. But, a statute, any statute, is the horse which pulls him into court. The horse, as the old saying goes, must come first. Hence, in a case such as this, a review of the statute is perforce, unavoidable.

Where a citizen and taxpayer brings a class suit in his capacity as a private attorney general, and the alleged violation of statute is clear, the court must grant standing. If the challenged action is one reasonably within the discretion of the executive, the Court, barring constitutional objections, should then regard the question posed as political, and standing should be denied.

Attempts by federal executives to exceed the limited powers granted to them by statute and by the

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[5] K.C. Davis, *op.cit.* Espec. discussion of the Administrative Procedure Act with historical references and citations, p. 633.

constitution must be jealously guarded against by a people that loves liberty. Unlawful acts by public officials are void, and in law, should not be acts at all. When a court fails to enjoin the unauthorized act of a federal agent, a presumption may arise that the court has approved the act. Life is thus infused into an illegal act, deriving from the power of the court to approve, rather than from the official who lacked the power to act. A court should never permit its imprimatur to dignify the unlawful act of a federal official acting in defiance of statutory authority. The doctrine of judicial restraint has no reasonable nor constitutional application in such a situation and should be foresworn.

III.

THE SECRETARY OF DEFENSE LACKS CONSTITUTIONAL AUTHORITY TO MAKE SALES OF ACTIVE DUTY AND RESERVE ARMED FORCES DEFENSE ARTICLES TO FOREIGN NATIONS WITHOUT SPECIFIC STATUTORY AUTHORITY.

Article IV, Section 3, Clause 2 of the Constitution grants Congress the sole power "to dispose of and make all needful Rules and Regulations respecting . . . property belonging to the United States." It is well settled that this is a very broad and unlimited power, *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1872), which cannot be usurped by any Federal officer, *United States v. Nicoll*, 27 Fed. cas. 149 (No. 15879) (C.C. N.Y. 1926) and by rules of the courts, *United States v. California*, 332 U.S. 19 (1947). Congress is not deprived

of its power to dispose of government property because such property is held by the Government for the benefit of all its citizens. *United States v. California,* supra; *United States v. City of Columbus,* 180 F. Supp. 775 (S.D. Ohio, 1959). Whether or not Government property should be disposed of involves complex "economic, technological, and philosophical considerations." See *Honchok v. Hardin,* 326 F. Supp. 988, 993-994 (DCMD. 1971), which the framers of the Constitution decided are best made by elected representatives.

It is also clear, that:

1) Full power of legislation in the matter of increase and reduction of the Armed Forces is with Congress. *Street v. United States,* 1890, 10 S. Ct. 309, 133 U.S. 307, 33 L. Ed. 631.

2) Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. *United States v. Allegheny County,* Pa. 1944 64 S. Ct. 908, 322 U.S. 174, 88 L. Ed. 1209.

A citizen's interest in deprivation of rights in government property is recognized by the Constitution of the United States under the Fifth Amendment right to due process of law. *Booth v. General Dynamics Corp.* 264 F. Supp. 465 at 471. (1967) "Congress may not destroy constitutionally protected property rights by the expedient of withdrawing jurisdiction from every court in which suits for enforcement could be brought." *Miller v. Howe Sound Mining Co.*, D.C. Wash. 1948, 77 F. Supp. 540.

IV.

CONGRESS DID NOT AUTHORIZE THE SECRETARY, PURSUANT TO TITLE 22, SEC. 2761 TO SELL DEFENSE ARTICLES BELONGING TO, AND USED BY, THE ACTIVE AND RESERVE ARMED FORCES OF THE UNITED STATES.

Some 1000 late model M60 tanks – an equivalent of three years production – were airlifted out of U.S. Army NATO military depots in West Germany and flown to the Middle East for use against Arab nations who were then friendly to the United States and other NATO powers. What was given away in a few weeks has not been replaced as American industry is unable to manufacture castings to expand production. A large number of F-4 fighter aircraft, M-48 tanks, and nearly one-half the highly sophisticated TOW anti-tank missiles were also airlifted together with many other weapons essential to the tactical and strategic readiness of the United States Armed Forces.

Nowhere, from a fair reading of the provisions of the Foreign Military Sales Act of 1968, the provisions of Titles 10, 22, 31, 50 or elsewhere in the United States Code, is the Secretary of Defense authorized to "sell" to Israel or to any other foreign government, any defense articles other than those that are excess to the needs of the United States Armed Forces. Any other interpretation of the Foreign Military Sales Act is obviously absurd. It is a flagrant misinterpretation of law, so preposterous in its result as hardly to be born of reason.

Respondent's contention has always been that the term "stocks" as used in Title 22, United States Code,

Section 2761, includes "items of inventory procured for the active and reserve units of the United States Armed Forces."[6] This follows, he reasons, because, "a reading of the term 'defense articles' shows no restriction on where the items therein enumerated are to be obtained."[7] Title 22 United States Code, Section 2311(a) is then cited to show that:

> The President is authorized to furnish, military assistance, on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise elegible to receive such assistance by –
>
> (1) acquiring from *any source* and providing (by loan or grant) any defense articles or defense service . . .[8] (Emphasis added by petitioner.)

"It is therefore clear," respondent concludes, "that military sales are unrestricted by virtue of the terms 'any defense article' and 'from any source'." (Emphasis added by Petitioner)[9]

Petitioner, on the other hand has maintained – that Section 2761, is encompassed in, and must be defined in, the context of the statutory scheme applicable to

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[6]See Appendix A which reproduces Respondent's final argument on the statutory question as it was presented to the United States Court of Appeals. References to Title 22 United States Code, Sections 2761, 2403(d), 2403(g), (2403(m)(2) and 2311(a) are also reproduced therein.

[7]Appendix A. P. 2.

[8]Id.

[9]Id., 3.

Foreign Military Assistance Programs, of which Foreign Military Sales are only a part. Section 1 of the Foreign Military Sales Act specifies that all sales under the act "be approved only when they are *consistent with* the foreign policy interests of the United States, (and) *the purposes of the foreign assistance program as embodied in the Foreign Assistance Act of 1961.*"[10] Obviously, for a sale to be consistent with the purposes of the foreign assistance programs as embodied in the Foreign Assistance Act there must be a specific legislative appropriation. Where specific Congressional authority or an appropriation of funds is lacking, none may be implied. This is essential to assure that Government property will not be misapplied.

> If appropriations are not used for the particular work designated by Congress they cannot be used for any other purpose.[11]

It would be utterly futile of Congress to legislate for, and to appropriate funds separately for (1) foreign military assistance and (2) the United States Armed Forces, if a civilian executive could, without other Congressional authorization, and contrary to the advice of high military authorities, apply the weapons procured for the U.S. Armed Forces to Foreign Assistance. It must not be presumed that Congress intends to legislate futility.

All kinds of defense articles (with specific limited exceptions, i.e., nuclear, etc.) may be sold to friendly foreign states pursuant to the Foreign Military Sales Act, but it breaches the bounds of reason to hold that

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[10]22 U.S.C. 2751. (Emphasis added by Petitioner.)

[11]21 Op. Attny. Gen. 414 (1876.)

the mere use of the term "any defense article" may be expanded to encompass "*all* of the defense articles of the United States." (Emphasis added.)

It is absurd to suggest that a civilian official, on his own authority alone, guided only by political considerations of a most partisan nature, may if he chooses, make sales to a foreign power of each and every weapon in the United States arsenal, without limitation or stricture of any kind; and, absent a declaration of war, or other hostile act, or a treaty of alliance; and, in the process to lay bare, not only the defensive readiness of the United States, but of the NATO allies! Does not the Constitution compel, and do not the people have a right to expect, more diligence of the Congress?

Manifestly, the term 'source' as used in Section 2311(a)[12] relates back to source of manufacture, source of origin. There is no express authority (apart from very specific and very limited provisions in Title 10 of the United States Code) that authorize transfers or loans of Armed Forces defense articles to foreign powers.

Respondent's conclusion that what Congress has not specifically forbidden, it has authorized, is without merit. The law is just the reverse. Title 31 of the United States Code provides:

> *Sec. 628. Application of Moneys appropriated.*
>
> Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

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[12]Appendix A.

Sec. 665. Appropriations – Expenditure or contract obligations in excess of funds prohibited.

(a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Respondent apparently finds statutory support to justify "Cash" sales of Armed Forces defense articles in Title 22, United States Code, Section 2403(m)(2)[13]

Petitioner submits that the "nonexcess defense articles" referred to in the above cited clause obviously refer to defense articles carried in inventory for use in the foreign assistance programs. A defense article procured for, or held for, military assistance obviously is "nonexcess" to Department of Defense needs. But, 'nonexcess' clearly is not the same thing as "stocks" containing items of inventory procured for the active and reserve forces, or that are held in the mobilization reserve of the United States Government.

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[13]Appendix A p. 3.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted; the judgment of the District Court should be reversed; and the Secretary enjoined from making further illegal "sales" of defense articles. In the alternative, the case should be remanded to the District Court for a new hearing before a different judge.

Respectfully submitted,

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APPENDIX A

III

THE TERM "STOCKS" IN TITLE 22, UNITED STATES CODE, SECTION 2761 DOES ENCOMPASS ITEMS OF INVENTORY PROCURED FOR THE ACTIVE AND RESERVE UNITS OF THE UNITED STATES ARMED FORCES.

Title 22, United States Code, Section 2761 provides that:

> "The President may sell defense articles from the stocks of the Department of Defense and defense services of the Department of Defense to any friendly country or international organization if such country or international organization agrees to pay not less than the value thereof in United States dollars. . . "

Executive Order No. 11501 (December 22, 1969), 34 F.R. 20169, as amended by Executive Order No. 11685 (September 25, 1972), 37 F.R. 20155, delegates the President's powers under this section to the Secretary of Defense.

The Appellant has not cited any section that defines "stocks" as being restricted in definition to military material in excess of that assigned to the inventory of active and reserve units of the United States Armed Forces. Instead, the Appellant, through a rather tortured reasoning process, attempts to take certain definitions pertaining to value and then arrive at a definition of the term "stocks". Yet, he goes about this the wrong way. Stock should be given its obvious meaning, namely a store or supply. The real crux of this issue is what is the meaning of "defense articles" which the President may sell

from the stocks of the Department of Defense pursuant to Title 22, United States Code, §2761. "Defense article" is defined in Title 22, United States Code, §2403 (d) as follows:

> " 'Defense article' includes —
> (1) any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war;
> (2) any property, installation, commodity, material, equipment, supply, or goods used for the purposes of furnishing military assistance;
> (3) any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, repair, servicing, storage, construction, transportation, operation, or use of any article listed in this subsection; or
> (4) any component or part of any article listed in this subsection; . . . "

"Excess defense article" is defined in Title 22, United States Code, §2403(g).

Had Congress intended that only excess defense articles should be sold, it would have so stated in Title 22, United States Code, §2761 and not used the term "defense articles". A reading of the term "defense articles" shows no restriction on where the items therein enumerated are to be obtained. The definitions contained in Title 22, United States Code, §2403 are not used to restrict the sale or provision of defense articles to other nations but merely to establish the value at which such articles may be determined for purposes of accounting. Title 22, United States Code, Section 2311 (a) provides in pertinent part:

"The President is authorized to furnish military assistance, on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance by—

(1) *acquiring from any source and providing (by loan or grant) any defense article or defense service . . .*" [emphasis added]

It is therefore clear that military sales are unrestricted by virtue of the terms "any defense article" and "from any source."

Furthermore, value is defined in Title 22, United States Code, §2403 (m) (2) as follows:

"[W]ith respect to a nonexcess defense article delivered from inventory to foreign countries or international organizations under this chapter, the acquisition cost to the United States Government, adjusted as appropriate for condition and market value;"

Nowhere is there any mention of such articles being dropped from inventory and accordingly Appellant's reliance on this subsection is misplaced. In fact that definition of value clearly contemplates that articles will be delivered from the inventory of items assigned to active and reserve units of the Armed Forces.